Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promoting Expanded Opportunities for Radio	)	ET Docket No. 10-236
Experimentation and Market Trials under	)	
Part 5 of the Commission's Rules and	)	
Streamlining Other Related Rules	)	
	)	
2006 Biennial Review of	)	ET Docket No. 06-155
Telecommunications Regulations – Part 2	)	
Administered by the Office of Engineering	)	
and Technology (OET)	)	

REPLY COMMENTS OF VERIZON WIRELESS

Dated: April 11, 2011

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REPLY COMMENTS OF VERIZON WIRELESS

Verizon Wireless hereby submits its reply comments on the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1]

I. SUMMARY

As Verizon Wireless noted, in its comments it supports innovation in network equipment and handsets by all qualified and interested parties, and supports the Commission's consideration of ways to foster that innovation through streamlining and updating its experimental licensing rules. However, as numerous commenters stated, the

[1] *Promoting Expanded Opportunities for Radio Experimentation and Market Trials under Part 5 of the Commission's Rules and Streamlining Other Related Rules; 2006 Biennial Review of Telecommunications Regulations – Part 2 Administered by the Office of Engineering and Technology (OET)*, Notice of Proposed Rulemaking, 25 FCC Rcd 16544 ("NPRM").

FCC should not grant experimental authorizations in licensed CMRS or microwave spectrum used to support CMRS networks without the consent of existing licensees, because of the risk of harmful interference to wireless communications, including to emergency and other services that rely on those communications.

In addition to these concerns, the FCC is without authority to adopt a proposal that would license third parties to experiment in spectrum that is currently licensed on an exclusive basis to CMRS licensees without licensee consent. Granting third-party licenses for experimental operations to operate in exclusive spectrum would be arbitrary and capricious given its abrupt departure from Commission policies, would constitute a breach of contract with existing licensees, and would result in a taking of property that the FCC is not authorized to perform. For these and the reasons set forth elsewhere in the record, the Commission should, at a minimum amend the proposed rules to issue experimental authorizations in CMRS spectrum only if CMRS licensees expressly consent.

II. THE FCC MUST NOT GRANT EXPERIMENTAL AUTHORIZATION IN CMRS SPECTRUM ABSENT THE EXPRESS CONSENT OF EXISTING LICENSEES.

As the FCC notes in the *NPRM*, CMRS spectrum is heavily used and experiments on bands assigned to mobile service providers (*e.g.*, the Cellular Radiotelephone Service, Broadband PCS, AWS, 700 MHz) could disrupt mobile services[2] To guard against this, it has been the practice of the FCC to condition experimental operations on the requirement that before commencing operations, the new licensee coordinate the

[2] *NPRM* at ¶ 19.

proposed operations with other licensees that may receive interference.[3] Under this process, as Lockheed noted most incumbents "are willing to accommodate coordination requests and most coordinations are concluded without incident."[4] Moreover, as Marcus Spectrum Solution stated, the current system "works very well and is not a major impediment to innovation."[5]

Despite the Commission's acknowledgment that experimental operations in CMRS spectrum could disrupt existing services and record support for the current process, the Commission has proposed creating in draft section 5.309 a process whereby experimental authorizations could commence in CMRS spectrum with just seven days notice filed on the FCC's web site "without specific approval or authorization once the seven calendar days has elapsed." As other commenters have advocated, the FCC should modify the proposed rule to protect existing CMRS networks and subscribers by requiring an experimental authorization applicant to obtain consent from each affected licensee.[6] Finally, any new rules should place the burden of proof of non-interference on the experimental authorization applicant.

Even where experimental licenses use spectrum that is adjacent to CMRS bands, there is the potential for harmful out of band or overload interference into licensed operations. It is thus critical that the FCC require coordination and consent of all CMRS

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[3] 47 C.F.R. 5. 85(e)

[4] *See* Lockheed Comments at 3.

[5] *See* Marcus Spectrum Solutions Comments at 5.

[6] *See* AT&T Comments at 2-4, CTIA comments at 8-9, Satellite Industry Ass'n comments at 11-13, Telecommunications Industry Ass'n Comments at 6-7.

licensees[7] operating on adjacent bands and adjacent markets for all radio experiments. Experimental licensees must coordinate with licensees on adjacent bands and provide sufficient information about the proposed experiment to allow CMRS licensees to adequately evaluate potential interference concerns. Notifications should be made a minimum of 30 days before a proposed start date to provide sufficient time for CMRS licensees to evaluate the proposed test. Finally, as noted by several commenters, experimental authorizations should be available to CMRS licensees and equipment manufacturers.[8]

Accordingly, the FCC should modify proposed section 5.309 to read as follows:

(a) At least 30 calendar days prior to commencement of any experimental authorization, applicants must provide the following information to the FCC's dedicated web site and to potentially affected CMRS licensees' contact as noted in the FCC's Universal Licensing System, operating in the proposed market/adjacent market on the proposed band/adjacent band: [continue as proposed in the *NPRM*]

(b) Experiments may not commence without approval of the affected CMRS licensees. The experimental authorization applicant bears the burden of proof that the proposed experiment will not cause harmful interference. It is expected that parties will work in good faith to resolve interference concerns, including modifying experiments if necessary to reach an agreeable resolution. [Subsections c-e continue as proposed in the *NPRM.*]

[7] Including CMRS licensees that hold microwave licenses that could be affected by the proposed experimental operations.

[8] CTIA Comments at 7-8, Qualcomm Comments at 8-9, TIA Comments at 3-5, and Cisco Comments at 2.

III. TITLE III RESTRICTS THE FCC'S AUTHORITY TO LICENSE EXPERIMENTAL AUTHORIZATIONS IN LICENSED SPECTRUM WITHOUT THE CONSENT OF CMRS LICENSEES.

While Section 316 permits the Commission to modify licenses, the FCC has made no attempt to comply with the requirements of this provision of the Act even if the Commission had properly proposed a modification of the licenses under Section 316, the agency still would lack authority to act. Section 316 requires that there be a "public interest" rationale for any modification of spectrum licenses. No such rationale exists here. Indeed, licensing experimental authorizations in CMRS spectrum would be contrary to a series of longstanding FCC policies that have been the cornerstones of its "public interest" findings in other contexts. For example, allowing interference with CMRS operations would run counter to the FCC's plans for increased broadband access,[9] and would also endanger public health and safety by jeopardizing the ability to make E911 calls.[10] Based upon the FCC's clearly-stated goals and justifications for the exclusive rules for CMRS services, modifying existing licenses to permit experimental

[9] *See Connecting America: The National Broadband Plan*, Federal Communications Commission (March 2010).

[10] License modifications of this type would also be inconsistent with the FCC's finding that the public interest is best served by allowing the cellular industry to innovate and improve the technology used to provide service based so as to make maximum use of the spectrum, see *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, Report and Order, 86 FCC 2d 469, ¶¶ 77, 112 (1981), and will adversely affect the FCC's auction policies by introducing regulatory uncertainty and making existing licensees and new entrants less likely to acquire spectrum for new services, ultimately devaluing spectrum offered at auction.

operations would undermine the FCC's long-standing policies.[11] While the FCC has authority to revisit these findings after following the proper procedures, the FCC has not done so here, and in any event the record simply would not support such policy reversals.

IV. IMPAIRING THE RIGHTS OF LICENSEES TO USE THEIR SPECTRUM WOULD BE ARBITRARY AND CAPRICIOUS.

The Commission's CMRS service rules,[12] together with CMRS license terms and conditions, establish two rights that would be fundamentally undermined by granting third parties new licenses to operate in this spectrum: (1) the right to exclude others from operating on the licensed spectrum within the licensed service area; and (2) the right to use licensed spectrum to the maximum extent feasible. Based on these rights, existing licensees have made substantial investments to provide mobile service nationwide. Modifying these rights would be arbitrary and capricious; such action would not only stifle investment in nationwide CMRS facilities, but it would also discourage development and use of the most efficient technologies.

First, as the Commission has stated, "[i]n the cellular service and in PCS, each licensee is entitled to exclusive use of its assigned spectrum within a Commission-defined licensing area."[13] Implicit in the concept of an exclusive license is the right to exclude

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[11] *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

[12] *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, *Third Report and Order*, 9 FCC Rcd 7988, 8042, ¶ 95 (1994) ("*CMRS Third Report and Order*").

[13] *See id.,* ¶ 131. *See generally* 47 C.F.R. § 22.351 ("Except as otherwise provided in this part, each channel or channel block is assigned exclusively to one common carrier in each service area."); *cf. id.* §§ 1.934, 1.1152, and 1.9005. *See also The Public Utility Commission of Texas et al.,* 13 FCC Rcd 3460, ¶ 89 (1997) ("The Commission's grant of a PCS license confers on the licensee an exclusive right to use a designated portion of the electromagnetic spectrum for the term of the license.").

others from using the spectrum.[14] The Commission itself has assumed the obligation to protect the rights of licensees from intrusion by third parties.[15]

Licensing experimental operations in CMRS spectrum without the consent of the existing licensee would be directly at odds with this grant of exclusivity, and would have significant consequences. In addition to the direct impacts on CMRS customers of interference caused by experimental operations—and the public safety dangers posed by such interference —introduction of experimental operations would also adversely affect the anticipated and expected value of these licenses. Such FCC action would inhibit licensees' willingness to innovate and build out to the same degree as in exclusive spectrum. Accordingly, it would be arbitrary and capricious for the Commission to change the rights to use CMRS spectrum by granting experimental licenses on that same spectrum.

Second, the policies governing the spectrum used to provide CMRS include flexible service rules and minimal technical regulation that provide licensees with the

[14] *BellSouth v. FCC*, 162 F.3d 1215, 1223 (D.C. Cir. 1999) ("CMRS spectrum is a finite resource and is also exclusive in that whatever one entity holds cannot be held by another."). In addition, Congress has recognized "*every exclusive license granted denies someone else the use of that spectrum,*" and exclusivity is "*what give[s] spectrum a market value.*" H.R. Rep. No. 103-111, at 249 (1993), 1993 U.S.C.C.A.N. 378, 576 (emphasis supplied). *See also Implementation of Section 309(j)*, 10 FCC Rcd 7970, 7995 (1994) (noting that "a licensee has exclusive use of a block of contiguous channels, such as in cellular and PCS"); *FCC v. Nextwave Personal Communications,* Nos. 01-653/01-657, Brief of the FCC, at 46 n.10 (May 6, 2002) (stating that "the FCC must protect [a licensee's] exclusive right to the spectrum and refrain from authorizing others to use that spectrum").

[15] "[T]he FCC must protect [licensees'] exclusive right to spectrum and refrain from authorizing others to use that spectrum." *FCC v. NextWave Personal Communications,* Case Nos. 01-653 and 01-657 (U.S.), Brief for the Federal Communications Commission at 34 n.10 (May 6, 2002)

right to use their spectrum to the fullest extent possible.[16] This policy was specifically set out in the development of both the cellular[17] and PCS service rules.[18] In doing so, the Commission created the expectation that CMRS providers could mine their spectrum to the maximum extent feasible for the duration of their license terms.

As a result, licensees built out systems and have continued to upgrade their networks by introducing new technologies that use their licensed spectrum more efficiently and effectively by, among other things, allowing operations at lower noise levels. Given the licensees' significant economic incentives to achieve spectrum efficiencies, there is every reason to believe they will continue to develop technologies that will allow operations at noise levels below today's limits. The experimental operations contemplated by the Commission will have significant pernicious effects on this trend and will degrade the ability of carriers to maximize the efficient use of their spectrum.

V. LICENSING NEW INTERFERING USES IN PREVIOUSLY LICENSED SPECTRUM CONSTITUTES AN UNLAWFUL TAKING.

The FCC does not have statutory authority to order a taking of property for public use pursuant to the Fifth Amendment Takings Clause. Because the rights of spectrum licensees are cognizable property interests that can be "taken" in the constitutional sense,

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[16] *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees and Implementation of Section 257 of the Communications Act: Elimination of Market Entry Barriers, Report and Order,* 11 FCC Rcd 21831, ¶ 2 (1997);

[17] *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, Report and Order*, 86 FCC 2d 469 ¶ 112 (1981).

[18] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order,* 8 FCC Rcd 7700 (1993).

licensing third parties to experiment in previously licensed spectrum would exceed the FCC's authority in the Communications Act by taking property of existing licensees.

A. Grant of an FCC License Conveys Valuable Property Rights.

While the FCC and courts generally recognize that a spectrum licensee does not hold a property interest in the license itself,[19] courts have found that rights integral to the license do constitute cognizable (and highly valuable) property interests, which the FCC may not lawfully impair.[20] These rights ensure that a license is not just "a non-protected interest, defeasible at will,"[21] but rather that "the right under a license for a definite term to conduct a broadcasting business requiring—as it does—substantial investment is more than a mere privilege or gratuity."[22]

With respect to CMRS licenses specifically, the FCC has recognized that licensees hold a broad range of rights, including the right to use spectrum in a given band, in a specified area, for a defined term; the right to renewal expectancy, the right to transfer, divide, or sublease use of the spectrum, and, most relevant here, the right to exclude others from using the same spectrum within the licensed geographic area[23] and

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[19] Both Congress and the Commission have indicated that FCC licenses do not constitute spectrum ownership. *See* 47 U.S.C. § 301; *see also Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Spectrum Policy Statement, 15 FCC Rcd 24178, 24187, ¶ 21.

[20] *Atlantic Business and Community Development Corp.*, 994 F.2d 1069, 1073-74 (3d Cir. 1993) (citations omitted).

[21] *Orange Park Florida T.V., Inc. v. FCC,* 811 F.2d 664, 674 n.19 (D.C. Cir. 1987).

[22] *L.B. Wilson, Inc. v. FCC*, 170 F.2d 793, 798 (D.C. Cir. 1948).

[23] *See Public Utility Commission of Texas*, 13 FCC Rcd 3460, 3503, ¶ 89 (1997); *Regulatory Treatment of Mobile Services,* 9 FCC Rcd 7988, 8042 (1994); *see also BellSouth v. FCC*, 162 F.3d 1215, 1223 (D.C. Cir. 1999). The FCC has recognized that a service area includes not only horizontal coverage but also vertical coverage, and that cellular carriers are entitled to the same interference protection from a neighboring carriers' mobile air-to-ground units as from mobile

the right to use the spectrum to the maximum extent feasible.[24] Based on the grant of these rights, licensees have invested tens of billions of dollars acquiring spectrum, constructing networks to use the spectrum, and upgrading their operations and services as wireless technology advances. To support this investment, the FCC has also acknowledged a licensee's right to continued wireless operations. Therefore, with the exception of actual ownership of the spectrum resource, which belongs to the public, an FCC license grants essentially the same property rights in the authorized spectrum as an interest in land.[25]

B. The Appropriation of an FCC Licensee's Rights to Use Spectrum for the Benefit of Third Parties Is a Taking.

Government action that appropriates the use and enjoyment of property from the owner is deemed a taking *per se*. Government laws or regulations that reduce or eliminate uses of an owner's property, without actually appropriating the property itself, are regulatory takings. An FCC decision to license third-party experimentation in licensed bands would effectuate a taking under either standard.

First, the grant of experimental authorizations as proposed by the FCC would result in appropriation of spectrum and the existing licensee's use and enjoyment of

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terrestrial units. *See AirCell, Inc.*, 14 FCC Rcd 806 (WTB 1999), *aff'd*, 15 FCC Rcd 9622 (2000).

[24] *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 7988, 8042, ¶ 95 (1994).

[25] The FCC also cannot revoke or modify spectrum licenses without specific substantive findings and following specific procedural rights. *See* 47 U.S.C. §§ 303(f), 312, 316. Based on the rights discussed in the text, spectrum licenses vest substantial indicia of traditional property rights in the licensee, and are therefore unlike other governmental permits found not to vest property rights, such as fishing and grazing permits. *See Conti v. United States*, 291 F.3d 1334 (Fed. Cir. 2002) (fishing license that was non-transferable, revocable at will, and nonexclusive did not confer cognizable property right in holder).

rights integral to its spectrum license and would thus be a taking *per se*. The "plain language" of the Takings Clause "requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation."[26] The controlling fact in such cases is that the government takes the "right to use" private property for a public purpose,[27] and the appropriation constitutes a taking regardless of its duration,[28] the value of the remaining property,[29] or whether the property taken is transferred to a third party.[30]

Granting experimental licenses in previously licensed spectrum would allow third parties to "occupy" spectrum that is licensed to someone else. Third party use of the spectrum, even if episodic, would occupy the spectrum regularly on as permanent a basis as the existing licensees.[31] Such governmental appropriation of the use of spectrum for the benefit of third parties would be no different in principle from the periodic or

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[26] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* , 535 U.S. 302, 321 (2002).

[27] *Id.* at 324 n.19.

[28] *Id.* at 322 (citing *United States v. General Motors Corp*., 323 U.S. 373 (1945) and *United States v. Petty Motor Co*., 327 U.S. 372 (1946)).

[29] *Id.* at 330 n.25.

[30] *See Kelo v. City of New London*, 54 U.S. 469 (2005) (a city's plan for economic development of an area by a private developer justified condemnation of citizen's residential property); *see also Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987).

[31] Introduction of new users in licensed spectrum also substantially devalues the spectrum for licensees who might seek to transfer the spectrum to another party. *See Loretto*, 458 U.S. 419 ("the permanent occupation of that space by a stranger will ordinarily empty the right [to sell] of any value, since the purchaser will also be unable to make any use of the property.").

temporary occupation of a building by the government,[32] of air by airplanes or munitions,[33] of land by water,[34] or of a rooftop by a cable TV box.[35]

Second, granting experimental authorizations to third parties would constitute a taking even if analyzed as a regulation on the licensees' use of spectrum.[36] To determine whether government action that regulates the owner's use of property is a taking, the Supreme Court applies a three-part test that considers (i) the nature of the governmental action; (ii) the severity of the economic impact of the regulation; and (iii) the interference with the owner's reasonable investment-backed expectations.[37]

Here, the character of the action would be intrusive and unusual. Granting licenses to third parties to use spectrum previously licensed on an exclusive basis would restrict licensees' ability to control the uses of the spectrum for which they hold a license, and indeed as the record in this proceeding shows would interfere with use of the spectrum by the licensee and its customers.[38] The economic impact of the proposed rule on licensees would also be significant. The proposed new use would result in

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[32] *See General Motors*, 323 U.S. 373.

[33] *See United States v. Causby*, 328 U.S. 256 (1946); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922)

[34] *See United States v. Cress*, 243 U.S. 316 (1917).

[35] *See Loretto*, 458 U.S. 419. The fact that the rights taken from these licensees are intangible or purely economic is no bar to finding an unlawful taking. *See, e.g.*, *Duquesne Light Co. v. Barasch*, 488 U.S. 299 at 309 (1989) ("[W]hat was 'taken' by public utility regulation is . . . the capital prudently devoted to the public utility enterprise by the utilities' owners.").

[36] Because spectrum is a public resource, it may be inapt to analyze a restriction on use of spectrum as an appropriation of private property. However, as discussed in Section V(A), spectrum licensees have well-defined rights in their authorized spectrum. Restricting its use by regulation post-licensing effectuates a deprivation of usage rights akin to reducing the economic value of land through imposition of land use controls.

[37] *See, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

[38] *Cf. Kaiser Aetna* v. *United States*, 444 U.S. 164 at 179-80 (navigational servitude over private marina was a taking under *Penn Central*); *Loretto*, 458 U.S. at 433-35 (character of government action in cases involving permanent physical occupation renders it a taking *per se*).

interference in a real sense with the operation of CMRS service within the licensed bands, and could require the licensees to take a variety of mitigation measures in order to deal with the interference. Finally, the proposed use would directly undermine licensees' reasonable, investment-backed expectations. Current licensees acquired licenses that the FCC explicitly denominated "exclusive." While the Communications Act authorizes the FCC to manage spectrum in the public interest, the Act also sets a very high bar for any proposed revocation or modification of spectrum, and the FCC itself has acknowledged that it is obligated to protect the exclusivity of CMRS licenses.[39] The combination of an intrusive occupation, substantial adverse economic impact, and justifiable investment based on reasonable expectations demonstrates that a regulatory taking has occurred under the *Penn Central* framework.[40]

C. The Commission Lacks Authority to Take the Property Rights of Spectrum Licensees.

Because of the serious takings problems that a discretionary reallocation and reassignment of spectrum rights would create, the Commission lacks authority to implement it. The Commission may not adopt a rule that constitutes or approaches an

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[39] "[T]he FCC must protect [licensees'] exclusive right to spectrum and refrain from authorizing others to use that spectrum." *FCC v. NextWave Personal Communications,* Case Nos. 01-653 and 01-657 (U.S.), Brief for the Federal Communications Commission at 34 n.10 (May 6, 2002)

[40] *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). The Commission's recent decision in the *Data Roaming Order* is not to the contrary. *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services,* Second Report and Order, ¶ 69, Docket No. WT 05-265 (rel. Apr. 7, 2011). There is no suggestion that the licensees will receive any compensation for the occupation of their spectrum by experimental licensees, and thus there can be no claim that licensees are receiving just compensation in exchange for a taking. Moreover, even assuming arguendo that the analysis in the *Data Roaming Order* is correct, it is inapplicable here. For the Commission to create new licenses that can actually interfere with the exercise of existing exclusive CMRS license rights presents an intrusion different in kind from that involved with requiring mandatory carriage of data services.

uncompensated taking unless Congress has clearly and unambiguously delegated such authority, which it has not done in this context. [41]

VI. CONCLUSION

For these reasons, the Commission should not extend the new program experimental license procedures to licensed CMRS spectrum. These spectrum bands are not suitable for third party radio experiments, because the risk of harmful interference to CMRS operations, as well as to Public Safety, E911 and other emergency services that rely on those operations, is too great. In addition to these concerns, the FCC is without authority to adopt a proposal that would license third parties to experiment in spectrum that is currently licensed on an exclusive basis without consent of effected CMRS licensees.

Respectfully submitted,

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[41] *Bell Atlantic Telephone Cos. v. FCC* , 24 F.3d 1441 (D.C. Cir. 1994), *superseded by statute*, 47 U.S.C. §§ 251 (c)(6) & (g) *as recognized in GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) (Because Congress in the Communications Act did not "expressly authorize" the Commission to adopt a rule that would result in such a taking, the Commission failed to meet the "strict test of statutory authority made necessary by the constitutional implications of the Commission's action.").